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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1151.

BERNADINE WARREN, administratrix *ad prosequendum* of the Estate of HARRY EDWARD WARREN, deceased,

Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as ANNANDALE CREAMERY CO.,

Defendant-Respondent.

ANSWERING BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI.

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Supreme Court of the United States

No. 1151.

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case

of

BERNADINE WARREN, administratrix *ad prosequendum* of the Estate of HARRY EDWARD WARREN, deceased,

Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as ANNANDALE CREAMERY CO.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT.

To the Honorable Justices of the Supreme Court of the United States of America:

Basis for the Court's Jurisdiction.

This application is made pursuant to the provision of *Rule 38, Sub-division 5* of the Rules of this Court.

There can be no question of the fundamental authority for the Court's jurisdiction. There is, however, serious

question as to whether or not this Court should be actuated in granting the review sought.

The Court's attention is directed to the fact that this case was tried before the District Court on April 17th, 18th and 22nd, 1941. The record indicates that the trial judge allowed counsel from April 18th to April 22nd to supply him with authorities which would justify the submission of the case to the jury.

The motion for dismissal was granted and, thereafter notice of appeal filed.

The matter was regularly heard by the Circuit Court of Appeals and decided on January 8th, 1942, in an opinion by Judge Maris. This opinion is reported in *126 Fed. 2nd No. 2, 160.*

Thereafter, the very questions presented to this Court were again presented to the Circuit Court of Appeals in a petition for rehearing which was denied on February 10th, 1942. (Record pages 54-61.)

There have been, therefore, thus far, three independent examinations of the facts and they have all been found to be deficient, and we, therefore, respectfully submit that appellant is not entitled to another examination on the same facts, *Page vs. Arkansas Natural Gas*, 286 U. S. 260, 271, Law Edition 1096.

Point I.

The sole question at issue is whether or not plaintiff-appellant presented sufficient evidence to warrant the submission of the question to the jury.

The transcript of the record herein presented approximates 5% of the testimony offered and at the argument before the Circuit Court of Appeals objection was made and the Court finally decided they would hear the oral argument and if necessary would have recourse to the transcript of the evidence on file in the Court.

Perhaps the paucity of testimony printed was caused by a misunderstanding of the new "stream-lined" Rules but it is our contention that an appellant, who seeks a review of evidence upon the assertion that that evidence adduced a question of fact, should be compelled to print all of the evidence and not seek to shift to the respondent the burden of printing the record.

Statement of Facts.

1. On August 18th, 1939, plaintiff's intestate, Harry Warren, was enroute from New York City to Pontiac, Michigan, where he was to meet his wife. Warren was employed by a New York Taxi Cab Company and was operating a Pontiac automobile.

2. Between 6:30 and 7:00 o'clock in the morning plaintiff's intestate was driving in a westerly direction on Route #28, in the Town of North Branch, New Jersey.

3. State Highway #28 is a two lane concrete road; each lane being ten feet in width with a dirt shoulder on either side.

4. Proceeding in an easterly direction on said highway was a tractor and trailer operated by Charles Knowles, originally a defendant. Defendant Haines' truck, operated

by his servant was about 250 feet behind Knowles. (Page 133, Line 8.) The left side of the defendant's truck was about a foot to the right of the center line. (Page 128, Line 24.) About 250 feet from the point of collision, between the Pontiac and defendant's truck there is a sharp curve on Route #28. The collision occurred on a straight-a-way which was practically level. (Exhibit P-3.)

5. As the coal truck approached the curve, the driver, Knowles, saw plaintiff's intestate approaching at a high rate of speed. (Page 103, Line 12.) At that time, plaintiff's intestate was coming around the curve (to his left) and was straddling the center line. (Page 103, Line 11.) His speed was so great that he could not get back on his own side of the road. (Page 103, Line 13.) Knowles pulled his tractor out of the path of the Pontiac but was struck at the back of the tractor and front of the trailer on the left side. (Page 103, Line 6.) Decedent's car bounced off the coal truck and continued west on Route #28 on its own side of the road, then veered to the left and struck defendant's truck. (Page 129, Lines 13-14.) The Pontiac then turned to its right and ran into a ditch on the northerly or its own side of the highway. (Page 84, Line 20.)

6. The impact between the vehicles was very heavy. The left front of defendant's truck flew in the air. (Page 130, Line 8.) The point of impact between the Pontiac and defendant's truck was the left front corner of each. (Page 108, Line 25, Page 109, Line 6.) State Trooper Wallace arrived at the scene before either vehicle was moved. (Page 93, Line 8.) Photographs of the vehicles were taken at the scene within an hour. (Page 97, Line 25.) All the physical facts; marks on the roadway, the damage to the vehicles, etc. plainly point to the fact that the accident happened on

the southerly side of the highway. (Exhibit D-1, Page 106, Line 14.)

Argument.

Apparently, the basis for this petition is an allegation that the Circuit Court of Appeals violated the opinion of Justice Brandeis in *Erie R. R. v. Tompkins,* 304 U. S. 64.

It is rather difficult to grasp the underlying basis for this argument since numerous New Jersey cases are cited by the Circuit Court of Appeals in its opinion. The statement of Justice Brandeis:— "There is no Federal general common law" should not be construed to mean that Federal Judges cannot have recourse to Federal decisions enunciating fundamental principles of law in further elucidation of the reasoning which leads to the conclusion reached. To so contend would be to insist that a local or State judge cannot have recourse to decisions of other States. This is absurd. Indeed, counsel in his brief, at page 17, cites the New York case of *Lee v. City Brewing Corporation.*

Apparently, the insistment in this case is that regardless of the evidence, the trial court cannot control the issue and decide it on the law.

This, again, does violence to a long line of New Jersey decisions. It has been held in New Jersey:

Negligence must be proved as alleged, *Cook v. American Gun Powder,* 70 N. J. L. page 65.

Negligence is never presumed but consists in a concrete act or omission which must be proved, *Wyckoff v. Birch,* 76 N. J. L. 646.

In *McCoomb v. Public Service,* 112 Atl. Rep. 255, the decedent was found dead near tracks on the Hackensack Bridge. There was no further proof. The court said, "Negligence is a fact which must be proved. It will not be presumed. There is always a presumption against negligence."

In *Olson v. Erie R. R.,* 124 Atl. Rep. 367, there was no eye witness to the accident. No one testified to the conditions under which decedent met his death. A witness heard moaning shortly after the train passed a crossing and heard no bell or whistle. The court sustained a non-suit.

The doctrine of "Proximate Cause" applies in New Jersey and has been reiterated innumerable times. An outstanding enunciation of the doctrine is *Morril v. Morril,* 142 Atl. Rep. 337. In the decision of *Martens v. Martens,* 11 N. J. Misc. Rep. 705, the Supreme Court said, "Violation of the traffic act as to speed is not conclusive as to negligence. Even if so, it was not the proximate cause of the accident".

It, therefore, remains to be seen whether or not the plaintiff in this case proved sufficient facts to justify the trial court in sending the case to the jury.

There have been numerous decisions in New Jersey constituting what creates a question of fact. Indeed, the rule is quoted by Judge Maris in his opinion, *126 F. 2d No. 2, page 160, at page 162.* There is a further illustration of the rule in New Jersey as follows: "The credibility of the witnesses and the probative value and weight of the conflicting evidence are for the determination of the triers of the facts, unless the particular witness' testimony is inherently im-

probable or is inconsistent with the common principles by which the conduct of mankind is naturally governed", *Clark v. Public Service,* 86 N. J. L. 144; *Second National Bank of Hoboken v. Smith,* 91 N. J. L. 531; *Sivak v. New Brunswick,* 122 N. J. L. 197.

The plaintiff's entire case on the liability was built around the testimony of the witness Hendershot. The insistment on the part of the appellant is that Hendershot said that defendant's truck was three feet from the edge of the concrete and that the southerly lane was ten feet wide; that the truck itself was eight feet wide, and, therefore, the truck must have been one foot over the center line and traveling at a speed in excess of the legal limit. Upon this hypothesis it is argued that a question of fact is presented. This contention is contrary to the proofs in the case. On direct examination the witness said that the truck was two feet from the edge of the concrete on two occasions. (Pages 44-45.) Then, at the request of the plaintiff's counsel, said that the truck was eight feet wide. This distance was measured on the jury box rail as six feet nine inches. (Page 47.) Then, after the noon recess, on re-direct examination, Hendershot said the truck was two feet from the edge of the road and again stepping to the jury rail, indicated a distance which was measured at three feet. Now, if the witness' verbal testimony or his indication of distance were accepted the defendant's truck would be on its own side of the road at all times, but, counsel for his own purposes accepts the witness' verbal statement as to the width of the truck and his indication of distance of two feet instead of accepting either. Upon such flimsy argument this Court is asked to review the decision of two tribunals who have heretofore examined the record.

It would appear that a witness' idea of distance which can vary one foot in estimating a distance of two feet is certainly incredible, and if his estimate of distance of eight feet is measured at the shorter distance in the morning, his ideas changed considerably after the noon recess. It is inconceivable that a man whose occupation was that of well driller could not estimate a distance of two feet. Indeed, after both counsel in the cause examined the witness, the trial judge took over the examination of the witness and we set forth for the court's convenience the examination of the court:—

"The Court:

The center of road, according to his testimony, as I understand it, is that center line which divides both concrete sections of the road.

The Witness:

That's right.

The Court:

Is that right?

The Witness:

That's right.

The Court:

You didn't see the collision, did you, Mr. Hendershot?

The Witness:

No, I didn't see it happen, I seen—

The Court:

In other words, you saw the truck pass—

The Witness:

Yes.

The Court:

—and shortly after that you heard a noise.

The Witness:

Yes.

The Court:

You looked up.

The Witness:

Yes.

The Court:

And when you looked up was either car, either vehicle, moving at all?

The Witness:

Yes, they were both going off towards the right side of the road.

The Court:

In other words, when you saw the truck and the Pontiac, each traveling in opposite directions, they were veering away from each other, is that right?

The Witness:

That's right.

The Court:

Each to the right?

The Witness:

Each to the right; and that there no more than happened than both of them were stopped.

The Court:

Well, do you know whether either the truck or the Pontiac was on the wrong side of the road?

The Witness:

No, they both looked to be right to the middle.

The Court:

In other words, when you saw them, both vehicles were moving away from the center line?

The Witness:

That's right.

The Court:

you saw it, was on the wrong side of the road?

And as far as you know neither vehicle, at least when

The Witness:
That's right.
The Court:
Is that right?
The Witness:
That's right."

Clearly, the essence of the testimony of the witness Hendershot was not given in response either to his direct or cross examination but upon the impartial examination of the trial court, and, in view of all of the foregoing, it appears that he heard a crash and at the time he heard the crash both vehicles were to the right of the center of the highway, and we, therefore, respectfully submit that Judge Maris' language is dispositive of this case where he says: "There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice".

For all of the above reasons, we respectfully submit that there is nothing in the proofs in this case which should actuate this august tribunal in granting the petition.

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Attorney for Respondent.

ISIDOR KALISCH,
Of Counsel.